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## The Case of the Missing Discipline: Finding Buddhist Legal Studies

REBECCA R. FRENCH†

Interdisciplinarity, intradisciplinarity, multidisciplinary and pluridisciplinarity<sup>1</sup> are hallmarks of current academics, as is the idea that every possible viewpoint should be employed to review each problem, historical and current. Scholars all over the academy lament the fact that their topic is overdone, over-theorized, overworked and re-defined *ad nauseam* by scores of graduate students. Friends say to me over lunch: do we really need to ask if Shakespeare was a transvestite? How many times do we have to hear the word "imbricated"? Barring the discovery of a trunk full of unknown letters in the attic, the one thing that rarely happens these days, they say to me, is that someone finds a real hole, a gap, a large area of study that sits right in front of us but has never been looked at. This essay is about the possibility of there being just such a hole.

Consider for a moment, the substantial discipline of Religious Legal Studies. Within the sub-field of Christian legal studies, for example, work proceeds at every academic level as well as in seminaries on issues of canonical law, on Christian foundations to Anglo American jurisprudence, on the influence of the Reformation on the legal systems of Europe, on morality in the law, on St. Augustine's *City of God* and its influence on Christian legal thought. Similarly, there are many centers of Islamic legal thought in Islamic and non-Islamic countries. With the U.S. currently struggling to democratize the governments of both Afghanistan

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1. Interdisciplinarity can be defined simply as integrating concepts and processes from different disciplines while multidisciplinary and pluridisciplinarity might be defined as having several researchers from different fields examine the same topic.

and Iraq, it has become very important to U.S. foreign policy to understand the effects of Islamic beliefs on the secular legal systems in these countries.

Judaic law has had many historic commentators and compilers and current areas of interest concern Jewish law's influences on American law, legal meanings in the Torah, the relationship between Judaic law and early Christian law, decision-making in orthodox Jewish communities, and the role of the Torah in modern Israel. Moving to a fourth world religion, Hinduism, the Dharmashastras and the Laws of Manu constitute the backbone of historical Indian responses to law. There are hundreds of books in both Asian and non-Asian languages on the role of Hinduism in India and its effects on the Indian legal system. With the rise of the Bhartiya Janata Party ("BJP"), the pro-Hinduism political party in the South Asian continent, the influence of Hinduism on the current operation of secular law in the Asian subcontinent has moved to the foreground once again. Each of these religious legal traditions has a long-established tradition of instruction, language training, classical texts and literature, chaired professors, annual conferences, Masters and Ph.D. programs as well as rabbinical and divinity training programs both here and overseas.

But Buddhist law has no such legacy. There are no established classic texts in this subject matter, no substantial literature, no body of students in M.A. or Ph.D. departments, no conferences, no chairs, no traditional pedagogy and no academic training programs in either religious studies departments or law schools. There are no professors of Buddhist law here in North America and although I continue to hope, I have yet to find them in Asia or Southeast Asia. Other than a book I wrote on the Tibetan Legal System,<sup>2</sup> some long articles on Burmese legal history by Andrew Huxley of the School of Oriental and Asian Studies ("SOAS") in London and David Engel's current work on injury narratives among Thai Buddhists, this is an immense research area that has no scholarship.

The conundrum is that Buddhism is not a marginal religious practice with little historical influence. It is one of the largest religions in the world with a presence for over 2,500 years and over 500 million followers in India, China,

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2. See REBECCA FRENCH, *THE GOLDEN YOKE* (1995).

Korea, Japan, Vietnam, Laos, Cambodia, Indonesia, Thailand, Burma, Tibet, Mongolia and Sri Lanka. Even the elementary student of religious studies learns very quickly that Buddhism is a major world religion; Peter Harvey states on page one of his introduction to Buddhism that "over half of the present world population live in areas where Buddhism is or has been a dominant cultural force."<sup>3</sup> But Buddhism, which is now also being taught in small and large centers throughout the world, has very few studies of its influence on the hundreds of legal systems where it has and does flourish.

Why then do we have this large disciplinary gap? Is it due to purposeful religious prejudice? Are some people actually blocking the development of the discipline? Is it due to the difficulty of the languages involved: Sanskrit, Pali, Sinhalese, Burmese, Chinese, Cambodian, Tibetan? Did the very nature of *disciplinarity*, the process of amalgamating and forming disciplines for the study of certain subjects in academics, preclude the study of Buddhist legal systems? How, in the midst of the many inter-, multi-, intra- and pluri-disciplinary study programs that now exist did we miss the study of Buddhist legal systems over the last 2,500 years?

This essay will track my own personal intellectual history in confronting this question, a history that is perhaps too long in the making. The first section of this article will be a narrative presentation of the results of my doctoral research work in legal anthropology. I will describe the Tibetan Buddhist legal system pre-1960 and the reactions of American legal academics to it. The second section presents briefly the Critical Theory and Cultural Studies concept of *disciplinarity*. I use it as a tool to investigate why Buddhist legal systems have not been welcomed into Comparative law, Legal anthropology, Law and Society Studies, Asian studies, Tibetan studies or even Buddhist studies. Finally, I will take a look at Tibetan Buddhist law from the inside out by examining some of the characteristics that we use to describe current Buddhism—the strong priest/patron divide, adaptability, the Mahayana/Theravadan distinction, the impact of areal studies on the formation of academic disciplines, the influence of post-modern theory and the situation of Buddhist studies—to explain why the study of

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3. PETER HARVEY, AN INTRODUCTION TO BUDDHISM 1 (1990).

secular legal systems in Buddhist societies has only just begun.

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## I. THE NATURE OF THE TIBETAN LEGAL SYSTEM

In January of 1996, I was on a plane, like many of my colleagues, headed for the San Antonio, Texas, meeting of the Association of American Law Schools ("AALS"). A few law professors interested in anthropology had banded together and applied for a new special division of AALS called Law and Anthropology. The conference was at the enormous San Antonio Palacio del Rio Hilton on the Riverwalk, one of those massive buildings that suffers from ubiquitous architecture syndrome in which most of these conferences seem to take place. I remember that the brochures in our packet of materials assured us that we were in Texas, and that our spouses could go out on trips to shop at Neiman Marcus, go to see a real Texan ranch or purchase "real cowgirl" Tony Lama boots in a store only a hundred miles out of town.

On the appointed day, the four of us entered the room where the panel was to take place and took our seats a good twenty minutes early. Surprisingly, the room was already full and people were struggling to find a spot to sit or stand. No doubt the crowd was not there to listen to Larry Rosen, Jean Zorn or I presenting papers but to catch a glimpse of the commentator, Clifford Geertz, a world famous figure in anthropology.

### A. *A Talk about the Tibetan Legal System*

I arose to give my twenty-minute presentation and proceeded to outline the basics of the pre-Chinese Tibetan legal system from approximately 1940 to 1959 that I had researched as my dissertation fieldwork. I began by pointing out that their government bureaucracy was headed by a charismatic religious leader, the Dalai Lama and had equal numbers of two types of administrative officials—lay officials trained in secular schools who were drawn from the noble and clerical classes, and monk officials, trained in monasteries from a young age to serve in the government.

Paired officials, one religious and one lay, manned each judicial level in every part of the system except for one. The administration had two judicial wings, the lay offices and courts for the secular population manned by paired officials and the ecclesiastical offices and courts for legal affairs concerning monasteries and nunneries throughout the huge country which was the one part of the government where only monk officials presided over legal cases and documents.<sup>4</sup>

### B. *How did a Tibetan court work?*

There were four different kinds of legal procedures available to the parties as well as several other extra-legal procedures: rolling dice for the answer, taking an oath in front of a god and consulting an oracle. The parties and the decision-maker had to agree on the choice of forum to proceed with a case that resulted in jurisdictional patterns that were flexible and based on consensus. Mandatory jurisdiction for any case but murder was not strong. There was also very little *finality* or *closure*. At any point in the proceedings before either the Highest Ecclesiastical Office or the local magistrate, a party could declare that he did not feel comfortable and request to move the case venue to, for example, a famous hermit living in a cave that both parties respected. If the other two agreed, the venue was changed.

Similarly, the final decision document reflected this *consensus* requirement; it was a document written by the court clerks and issued by the judge at a final ceremony

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4. There are five major sources for Tibetan legal concepts: (1) religious sources material such as the Vinaya which is a canonical text outlining the rules for the monks to follow as Buddha spoke them case by case; (2) Extant official documents which include administrative law books, edicts, decision documents, treatises, government contracts, estate record books, tax records and deeds to land; (3) documents issued by non-governmental institutions such as monastic constitutions, private leases and private contract documents; (4) law codes; and (5) written and oral statements describing the legal system. As far as we know, there were no books on court procedure, compendiums of cases, extensive commentaries on the law codes, lists of additional statutes, books of regional variation of administrative rules or casebooks. I have opined that this is a consequence of the fact that each case was unique and Tibetans, as a result, did not want to know as much as we do, for example, what had happened to other people. See Rebecca French, *Tibetan Legal Literature: The Law Codes of the dGa' ldan Pho brang*, in *ESSAYS IN TIBETAN LITERATURE: STUDIES IN GENRE* (José Cabezon & Roger Jackson eds., 1996).

during which it was signed and stamped by each party and each party's guarantor. This demonstrated their agreement to the decision and bound them. A large liquidated damages clause was put in every document ("if this decision is not followed by the parties or these parties return to court, then the moving party shall have to pay fifty gold *srang* to the standing party"). There was no case finality, no point at which the case formally closed because any contestant had the right to bring the same suit up against the same person in the same or a different forum until their *mind was calm*. What kept them from doing this indefinitely was the negative social view of litigating, the cost or the fact that "their mind had become calmed." Thus, Tibetans kept the process *open* and reopenable because they valued the mental feeling of resolution; they used to tell me that a poorly wrought decision which angers one side must always be capable of being reopened or the anger that is generated by it will affect other parts of community or nation, it will come out again, perhaps in a more violent way.

When the local police or official was called in on a problem and the contesting sides described what happened, several consultations in the houses of important people to which the parties were related was the next order of business. Tibetans believed that *equality* meant equal in wealth and social power; they opined that a contest between two individuals who were unequal in wealth or social power was unfair. The person with less had to work up the social ladder through contacts until she or he had found an individual of equal social standing to the other party to proceed. They thought that our system was based on a mythical idea, and was ridiculous in its assessment that all people are equal before the law. It should also be noted that a much *wider net of persons* was responsible for the results of both criminal and civil cases (although this is not a distinction that they used). All the persons along the path of a transaction or incident were presumed to have responsibility for the outcome and to appear in court. A landlord or landowner on whose property the murder was committed was responsible, for example.

C. *Judicial Decision-making and Foundational Legal Concepts*

What was the role of the judge and what type of decisions did he make? Buddhist concepts permeated the legal process: *karma* could dictate that bad actions in a past life were the reason that a person had committed a crime in this life and the results of this crime would undoubtedly result in bad karmic seeds for the next life. Judges took on the karmic consequences of the punishments that they ordered. Tibetan jurisprudence located the decision-making process not in the courtroom but in the head of the participants which emphasized the importance of the mind. Therefore, there was no closure unless there was mental agreement and, as I have said above, the same case could be opened in the same court the day after if one's mind remained angry.

Precedent was not generally applied in the Tibetan legal system because the law codes outlined a set of factors for consideration and each case was viewed as entirely unique. This eliminated several concepts we view as essential such as *res judicata* and *stare decisis* and even the idea of rule-making, that is, evolving new rules for universal application from a single case. If each person and each case is unique, this is impossible. Judges as well as parties were expected to be governed by *rang khrims* or "inner morality" which meant self-regulation and self-control through the ethical concepts in Buddhism. Thus, "acting for one's own benefit" or "acting without the ability to discriminate," these Tibetan expressions were both references to negative motivations in the law codes of the Dalai Lamas and they mattered in a legal suit. The Buddha himself, as recounted through countless mythological and historical stories, represented the standard not of "reasonable" conduct but of right moral conduct.

The most universally applied terms for evaluating aspects of the legal cases were the words, *truth* and *honesty* and they were used to express a wide range of English terms such as probity, justice, due process and fairness. *Truth* was reached when the parties agreed and had factual consonance and not when the facts comported with the reality of the circumstances. After the decision document was signed, all of the parties were expected to sit down for a "gathering together" ceremony in which they drank beer



together and exchanged scarves to demonstrate their calm minds.

So, that encapsulates my very short presentation. Larry Rosen followed with discussion of law in Morocco, then Jean Zorn with a case from the highlands of New Guinea and finally, Clifford Geertz elegantly summed it all up. And this is when it all got very interesting. Almost every question afterwards was for me and they were pitched in a surprisingly high tone reminiscent of the encounter with the "romantic other." In the dry world of legal academics, this tone was new. Here is a sample of one of the questions:

"The Tibetans seem to have come up with a system that solves the ills that we have in terms of inequality. I love the idea of equals in the social system only dealing with equals. How do you think we could use that system here?"

A second professor said: "The system you describe sounds impossible with no processes for closure and finality and yet so much of it is true; it is obvious to all of us that angry clients lead to more law suits. I work in Labor Law and those decisions actually do stay open even though we pretend that they don't. This is very exciting stuff."

## II. LEGAL RESPONSES TO MY EXPLANATION OF THE TIBETAN LEGAL SYSTEM

I lost sight of Geertz whom I had wanted to speak with because I was surrounded by a horde of professors as I left the room, all asking questions, wondering where they could find more information and asking me for coffee. In anthropology, we would probably describe this behavior as akin to a religious conversion response. I have come to label this group of lawyers the *Legal Romanticists*, that is, legal actors who see other systems of law as miraculous, exotic cure-alls providing answers for one of the perceived problems in Western law. The room had been full of them and I have met many others in my presentations. Though a wonderful lot and very kind, they do not take the subject seriously. The *Legal Activists*, a second type, appear at Amnesty International meetings on Tibet and other more political forums where I have spoken. They take the material very seriously as a call to come to the aid of the Tibetan people being exploited by the Chinese. Many of these people are doing very important work in getting Tibetans out of prison and petitioning the Chinese government. Here, the

plight of the Tibetan is a call-to-arms for the Legal Activist. The Legal Romanticists are quite close to the *Legal Tourists*, legal actors who think that it is a lot of whimsical good fun and do not take any of the material seriously—this is legal-lecture-on-Tibet as the equivalent of a humorous show on the Discovery Channel.

By far the largest group I lecture to, almost 80% of the respondents I have tabulated over 10 years, are the *Legal Imperialists* who spend most of their time differentiating other systems of law as inferior to, and less legitimate than, the U.S. legal system. For these *Imperialists*, the American system is the center of the current global system, the democratic exemplar and template. *Legal Imperialists* never have to take any other legal system seriously. Anthropologists would call this simple blind legal ethnocentrism.

Because the *Legal Imperialist* is the majority response, I have divided up their moves into seven subtypes to leech out which responses are the most recognizable. First is the:

- *Territoriality move* (“The Tibetans don’t even have a country any more do they?”); then there is the
- *Technology/evolutionary move* (“They don’t have any modern industry there, right and didn’t know how to use a wheel?”);
- *Size move* (“How many people lived in this place anyway?”);
- *Anti-religious/fundamentalist move* (“Well, this was an established religious state, a cult so they all had to follow him, even in law.”);
- *Barbarian move* (“Didn’t I read that those people cut off hands and legs?”);
- *Pragmatic move* (“We couldn’t apply any of that here, because none of it would work, but your talk was very interesting anyway, thank you.”); and finally, the
- *Argument to non-law* (“Without any real rules, this sounds a lot like just alternative dispute resolution to me rather than an actual legal system.”).

Of these seven, the argument to non-law was by far the most common, constituting approximately 56% of the *Legal Imperialist* responses.

What all of this coding reveals however is the strong reluctance of the legal academic communities to address the law for what it is, a full-blown Buddhist legal system. The

reception by an audience, a dismissal from serious consideration rather than an acceptance at face value, is the problem. In my view, the nature of the Tibetan data creates hundreds of interesting legal questions to ponder. So, initially at least, the responses of legal academics were not very thoughtful.

### III. DISCIPLINARITY

I would like to turn at this juncture to the field of *disciplinarity studies*. Michel Foucault has argued that knowledge is governed by power relations such that "what is allowed (knowledge) and what is not allowed (the 'unthought') are generated in relation to systems of authority, rules, hierarchy and discipline, the last term including the interesting combination of a body of knowledge and practice and the results of training, suppression and repression."<sup>5</sup> These ideas have become embedded in the fields of Critical Theory and Cultural Studies and were initially employed in the disciplines of education, rhetoric, and English literature. Disciplinarity studies can be defined most simply as the detailed study of the origins, history, contents and institutionalization of academic disciplines, the ways in which knowledge becomes power and certain cultural materials are foregrounded or backgrounded to constitute "discipline-ness."<sup>6</sup> Most advocates do not cite as fondly to their Foucauldian origins as they do to Raymond Williams's *Culture and Society* or Nelson, Treichler and

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5. CRITICAL THEORY SINCE 1965 137 (Hazard Adams & Leroy Searle eds., 1990).

6. KNOWLEDGES: HISTORICAL AND CRITICAL STUDIES IN DISCIPLINARITY 2 (Ellen Messer-Dardow et. al. eds., 1993). Anthropologists have tried to enter Cultural Studies arena but have done so rather unsuccessfully on the whole and have kept "a certain palpable distance." This is no doubt due to the fact that they find the subject matter of Cultural Studies always local and bourgeois. They opine that Cultural Studies presents itself falsely as "non-disciplinarity, anti-disciplinarity or multi-disciplinarity" although it is based rather transparently on "an ideological commitment to oppositional politics and some legacy of Marxism" as well as Foucault that is, coincidentally, not unlike many of the anthropologically trained professors in the U.S. today. Virginia R. Dominguez, *Disciplining Anthropology*, in DISCIPLINARITY AND DISSENT IN CULTURAL STUDIES 40-46 (Cary Nelson & Dilip Parameshwar Gaonkar eds., 1996).

Grossberg's *Cultural Studies*<sup>7</sup> which states in the introduction "that disciplines stake out their territories and theoretical paradigms, mark their difference . . . by claiming a particular domain of objects, by developing a unique set of methodological practices and by carrying forward a founding tradition and lexicon." While several other key theorists in this movement could be named such as Stewart Hall, Antonio Gramsci, Edward Said, and Erie Hobsbaum, what is more important is the current social practices that employ this theoretical stance particularly literature, aesthetic and textual media studies, education, composition studies, film studies and communications. The fieldsites of Cultural Studies scholars tend to be popular culture arenas such as MTV, Disney theme parks, rock concerts, the Book-of-the-Month Club, soap operas, advertisements and graffiti but in the area of disciplinarity studies, the fieldsites are necessarily disciplines like accounting, biology, nature studies, the social sciences, economics, art history, law and medicine and of course, religious legal studies.

#### A. Application of "Disciplinarity" to other Academic Departments

I took this theory, that academic disciplines and sub-disciplines were purposefully engaging in knowledge/power strategies to eliminate material that contested their boundaries (such as the Tibetan Legal System), and began to ask if it applied to other arenas in which I had been giving presentations. The areas I would like to discuss briefly are (1) some legal sub-disciplines: Comparative Law, Legal History, Law and Religion, and Law and Society; (2) Anthropology and Legal Anthropology, the latter a sub-discipline in which I founded the journal so my ties should be very strong; and (3) Asian Studies, Tibetan Studies, and Buddhist Studies. I have given several talks or published in each of these areas, which will serve to constitute my initial database for disciplinarity appraisal.

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7. Resulting from a conference of the same name in April of 1990. See CULTURAL STUDIES (Lawrence Grossberg et. al. eds., 1992.

B. *Comparative Law, Legal History. Law and Religion, Law and Society*

Of the subdisciplines in law, Comparative Law is certainly the one which I thought initially was most promising—I had been trained in it, and my collection techniques, I thought, allowed for comparisons of the Tibetan material to the European and other Asian systems. On the whole, Comparative Law turned out to be ill-suited because legal comparativists are perpetually tied up in arguments about how to compare and about where a legal system fits according to some typology of legal systems such as Zweigert and Kotz.<sup>8</sup> The interesting comparative work going on is in substantive legal fields like criminal or labor law. Annelise Riles has written an article about the categorizing, typology conundrum in comparative law in which she designates me as the primary example of a “contextualist,” a person who thinks that the context of the environment in which she works is pre-eminent. She goes on to discuss why contextualists are marginalized or marginalizing with respect to comparative law.<sup>9</sup> As a side note, Legal History meetings are very fun and the people are wonderful but everyone there is really only interested in American law. China has a little bit of purchase but that’s about it.

Next, I thought about Law and Religion, a fairly small subdiscipline in Law and one that is primarily active through the *Journal of Religion and Law* out of Hamline Law School. In the United States, the Free Exercise, Free Speech and Establishment clauses of the Constitution, along with the theories of secularization and privatization, have put blinders on the legal academy’s attempts to look seriously at religion. Within the current discourse framework, the correct view of religion by a law professor is unequivocally non-religious, that is, one should not define oneself within legal discourse or legal practice or in front of law students as a religious practitioner. Exceptions are made in the very small field of moral discourse and practices through faith. Anxiety about this self-editing has

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8. KONRAD ZWIEGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 1998).

9. Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT’L. L.J. 221 (1999).

become a form of lamentation by the writers in the field such as Michael McConnell, Michael Perry, Kent Greenawalt, Stephen Smith, and others.<sup>10</sup> But, do we find lots of law review articles on other countries' legal systems? Or articles even on the plentiful new religions in this country? Hardly (although this is changing some). As a result, as I have argued elsewhere, "Legal scholars in America have a hard time comprehending the richness of an integrated religious perspective such as that of Tibet . . . ."<sup>11</sup>

Well, what about *Law and Society*—isn't that an academic forum where an anthropologist feels comfortable? The Law and Society Association has its own mixture of disciplinary conformity. For one thing, it has been moving away from an interest in close anthropological observation and interviewing as a way of gathering appropriate data since its inception. At her installation as President of *Law and Society* in 1998, Susan Silbey presented some statistics on trends in publication in the *Law and Society Review*.<sup>12</sup> While she did not code by subject, her presentation did show a dramatic decrease in the methodologies of interview and observation in articles in the *Review*. Anthropologists, who often work overseas and specialize in these face-to-face techniques, constituted only 7.1% of the authors since the journal's inception. The use of interviews and observation as techniques in articles in the *Review*, whether by anthropologists or not, had dramatically decreased over the years from the 1960s when 68% of the authors used observation and 59% used interviewing techniques to the 1990s when

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10. Everyone is willing to take the originalist, foundationalist move to argue about the religious affiliation of the Founders of the Constitution. The rationales presented these days for the language in the First Amendment are, first, Roger Williams's desire to protect the church against the corruption of the government, or second, James Madison and Thomas Jefferson's attempts to protect politics from the infighting and influence of the church. See MARK HOWE, *THE GARDEN AND THE WILDERNESS* (1965). A third strategy is to argue that these early politicians were working within an integrated Puritan-Protestant religious ideology that was "essentially uncontested at the time." See Charles Taylor, *Religion in a Free Society*, in *ARTICLES OF FAITH, ARTICLES OF PEACE* (James Davidson Hunter & Os Guinness eds., 1990).

11. See Rebecca French, *A Conversation with Tibetans? Reconsidering the Relationship between Religious Belief and Secular Legal Discourse*, 26 LAW AND SOC. INQUIRY 95 (2001); see also Rebecca French, *Shopping for Religion: The Change in Evolving Religious Practice and its Importance to the Law*, 51 BUFF. L. REV. 127 (2003).

12. Susan Sibley, Inaugural Presidential Address at *Law and Society* (1998).

11% used observation and less than 35% used interviews. Indeed, the term "interviews" here has changed over time; they are no longer face-to-face interrogations over an extensive period of time but large standardized telephone questionnaires, so the statistic itself is perhaps problematic.<sup>13</sup>

Although Law and Society is where I spend most of my time, primarily because I like the people and the conversations, Tibet remains simply a quirky oddity in that forum. I remember first being introduced to Larry Friedman in the early 1990s and he responded very politely as he shook my hand, "Oh yes, you are the Tibet lady, hmmm, yes I have heard of your work." As to panels and discussions of religion at Law and Society, I think that I have been on almost every religion panel since 1991. There is rarely more than one a year. As religion is very marginal in criminology departments, in justice studies, in the larger sociolegal programs at Berkeley, Wisconsin, UC Irvine and NYU, it just doesn't currently fit well into the Law and Society Association. Perhaps a final reason is that this multidisciplinary group has been flipping through several theoretical frameworks in the last twenty years (ideology, hegemony, social construction, hybridity, non-essentialism, governmentality, illegality, legal consciousness and identity) a process that dampens the possibility of presenting new, only partially theorized, data.

### *C. Anthropology, Legal Anthropology*

Anthropology is my home discipline besides law. I know professors, other students, students of students, friends from four years in the field, publishers, conference acquaintances and numerous others. I have made lots of presentations over the years since 1988 when I first returned from the field. The problem that I have in anthropology seems to be two-fold: first, a shift in the subject matters to those influenced by Cultural Studies that occurred when I was in the field, and second, a very strong

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13. And the journals in this area often actively reject material on religious legal systems. I have had entire commissioned symposia on religious law for major journals in the field rejected by reviewers of Law & Society as not relevant and then dropped. I have seen commissioned reviews of my own and other books on religious legal systems rejected in the two major journals of Law and Society.

theoretical shift that impedes the presentation and analysis of primary data without a specific current theoretical framework. By the time I got back from the field, anthropology had begun to shift its locus to migrating immigrant networks, refugee diasporas, foreign adoption, domestic violence, abused women, prostitution, the spread of AIDS, multi-million dollar corporations, Global Network Theory, Global Media events, and Human Rights Activism. Most of the panels at AAA meetings had shifted to Pierre Bourdieu's praxis analyses or to the localism of globalism in Sumbawa rather than the legal systems in Sumbawa, Indonesia. Anthropology had finally become very current and very theoretical which is a commendable, relevant and frankly very exciting turn but not one that fits the study of religious legal systems particularly well.

The only people really interested were legal anthropologists which is understandable but none of them were working on larger nation-state systems as I was. Anthropologists, especially legal anthropologists,<sup>14</sup> are now investigating very different sorts of spaces, places, times, identities, movements and entities than they ever have before and incorporating new theoretical perspectives. As a consequence, while Tibet and Tibetans are increasingly objects for anthropological study, the descriptive study of their religious national legal system is not central to the current discipline of anthropology or even particularly relevant to the sub-discipline of legal anthropology. Luckily people admired my work, especially because I had stayed there a long time. In one review, Don Brennis called the *Golden Yoke* a "locus classicus," which is both an incredible compliment and an antiquated term.

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14. See Dominguez, *supra* note 6, at 53, presenting the topics as gender, hierarchies, differentiation, "race, racism or racialism; ethnic identity, ethnicity, ethnic conflict or interethnic relations, minorities (including Afro-American history, Latino Studies, marginality and multiculturalism); and nation, nationalism, transnationalism and the national." She goes on to outline the theoretical stances as: "colonialism"; "postcoloniality"; "resistance"; "hegemony"; "the discourse of subalternity"; "rebellion"; "inequality" or "power relations"; "bodies"; "sexuality"; "cultural politics"; "the invention of tradition"; "identity"; "the past"; and "imagined communities."



*D. Asian Studies, Tibetan Studies, and Buddhist Studies*

The three last areas in which I tried to present my work were Asian Studies, Tibetan Studies and Buddhist Studies. The background of Asian Studies in the United States has been described in several articles and I think that the salient points of this critique are beyond dispute. Area Studies were instituted at the behest of the Federal government after World War II and overseen from a distance by the CIA. Most of the scholarships and federal funding for the study of languages in the United States still comes from Department of Defense grants. The Federal government has been very successful in promoting the areal studies programs to focus on specific characteristics of particular countries deemed crucial to national defense. In this approach, countries are promoted as unique, languages are studied separately, and politically important areas matter. Religion is not an essential part of this schema and neither are interstitial and less powerful areas such as Tibet.

In both Tibetan and Buddhist Studies, my work is of great interest but there are few people to talk to. I have always been put on panels with people who are working on the philology of specific words, or the ancient traditions of prior kings, or lately, on panels in which I am expected to discuss the most current legal developments by the Chinese on the Tibetan plateau. I have helped to start a field of study in Tibetan Law but I only realized later that I got the last information that was available to be collected from living subjects by interviewing in the 1980s the only living former esteemed judges and officials. In summation, the study of Buddhist legal systems with Tibet as a subset was not to be found in any of the disciplinary homes that I investigated.

Where does this leave us? Interestingly, one could argue that many of these academic disciplines and sub-disciplines are purposefully engaging in knowledge strategies that eliminate consideration of Buddhist legal systems. This is true in comparative law, certainly, but it is an area that has so many critics presenting different solutions to the "problem" of comparative law that it seems like flogging a tired animal. *Law and Society* certainly should be paying attention to religion and is not. And how does one excuse legal anthropology? But is it really the case that these scholars are actively repressing or are they just scrambling to fit in

and taking their exclusionary clues from elders? Scholars are solipsistic enough not to be interested in much of anything except what they have been taught to do. Having spent several years working on the inside of organizations like the Association of Political and Legal Anthropologists and Law and Society, it was hard to identify the "suppressors," including myself, and easy to point to one stumbling decision after another.

#### IV. WHY DON'T WE HAVE BUDDHIST LEGAL STUDIES? SOME THOUGHTS FROM THE INSIDE

In 1994, Frank Reynolds, an esteemed professor of religion and South Asian Studies at the University of Chicago Divinity School, called me up and asked me to a Numata conference on Buddhist Legal Systems. There were four speakers: David Engel of SUNY Buffalo Law School, Oskar von Hinuber of Freiburg University in Germany, Andrew Huxley of SOAS at the University of London, and myself. A panel of experts from our geographic specialty backed each of us as we spoke. I had never been more excited and thoroughly over-prepared to give a paper. While I enjoyed the conference and the dinner at the Robie House immensely, there is no evidence that the resulting publication, a great series of papers in the *Journal of the International Association of Buddhist Studies*,<sup>15</sup> was ever understood very well by its larger audience. During the four days, Von Hinuber strongly denied that there was anything like Buddhist secular law other than the words of the Buddha for instructing the monks. Others thought the conference was interesting but tended to deny "pan-Buddhist law" as a possibility.

##### *A. Visiting an Old Professor*

It was, however, a chance meeting with an old professor in 2000-01, that started me thinking in a completely different way. I was asked to write an article on Religion in the next Millenium for the *Yale Journal of Law and the Humanities* in the year 2000 and to deliver it as an address at the school. There in the audience were some of my old

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15. Symposium, *Buddhism and Law*, 18 J. INT'L ASS'N BUDDHIST STUD. 1 (1995).

professors, which made me very nervous and I gulped several times as I spoke. Afterwards, they came up to me, very proud and announced that we were all going to dinner at the house of my anthropology mentor, Leopold Pospisil. The food was wonderful and I had an opportunity to ask a few questions of several people who knew a great deal more than I did about Buddhism, Law and Anthropology.

One of these was Stanley Weinstein, a brilliant, charming person and absolute bear of a professor. His students had to learn classical Chinese and Japanese as well as modern Chinese and Japanese before they could sit in his enormous basement library of original texts, while translating early Buddhist texts line by line under his tutelage. I was always glad that I was in Tibetan but could still take all of his classes on Buddhism. Anyway, he asked me how my work was going and then I asked him about Buddhist legal systems. He paused and thought for a while, holding up his right index finger to his mouth, "You know, Rebecca, I can't think of anything written on Buddhist Legal Systems. Maybe you should look in *The Encyclopedia of Religion*. I know there isn't anything in my library. Hmmm." I pressed him further by pointing out that there were studies of Judaism and Hinduism and Christianity and their relation to law. He replied, "There is nothing that I know that has been written on Buddhism and Law, Rebecca. Who is situated to do such a thing anyway? Why don't you?"

I lay awake that night in my bed upstairs in Pospisil's house unable to sleep. Here, I had been searching desperately for probably ten years for a disciplinary home, collecting sad stories of how the Tibetan legal system really didn't fit anywhere, wondering about the repressive and "othering" tactics of this and that discipline when in fact the discipline to which it would be central, namely, Buddhist Legal Studies, didn't even exist. The Chicago conference had not brought together the experts, it had demonstrated that it really didn't exist yet as either a concrete intellectual possibility or as a subject matter. If Stanley Weinstein didn't know about it, it was no one's fault. There had to be a few good internal, non-repressive reasons. I felt excited.

*B. Thinking from the Inside*

The reasons that I have now collected for this large Buddhist-Legal-Studies-Hole, even in these interdisciplinary, multicultural, cross-boundary times, are as follows:

First, the *priest-patron divide*. Several scholars believe that when the Buddha set down rules for the monastic sangha, known as the Vinaya, he precluded the lay Buddhists and therefore secular legal systems. Von Hinuber's claim was that the Buddha made no requirements for anyone but the monks and therefore, there were no secular legal systems affected by the Buddhist religion. Indeed the story of the Buddha is of a man who gives up his political life as a prince and future king to practice wandering as a holy teacher. It is true that there is a divide between the monks and the supporting laypersons, but Von Hinuber's claim is false. Many nation-states had secular legal systems that are and were profoundly affected by the foundational principles of Buddhism just as Tibet was. Most Buddhist scholars have been hoodwinked by this false interpretive line, the legal rule for the monks and the non-legal nature of lay Buddhism.

Second, *adaptability* and *compliance*. As Buddhism moved across the Asian and now the Western landscape, it was consistently open-textured and adaptive. It commonly blended with the local traditions like animism and Shinto. Thus in some states such as China, as Brian McKnight claims, the influence of Buddhism on the law was minimal because the older Confucian traditions were maintained.<sup>16</sup> We should not be blinded however by the characteristics of adaptability and compliance into thinking that those aspects of the religion meant no influence as well. Two other related issues are the concern in East Asia over non-indigenous influences in their history and the strong anti-religion orientation of Communist regimes.

Third, Buddhism is not a *mutually exclusive religion*, that is, it does not require adherence, it does not demand the creation of a polity or a legal system that comports with its views, it does not exclude other religions and it does not require absolute faith. These are traits of the Western

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16. Conversation with Brian McKnight, Professor Emeritus, East Asian Studies, University of Arizona, at the University at Buffalo Law School (June 2004).

Abrahamic religions, the mutually exclusive Jewish, Islamic and Christian religions ("You will be saved only if you believe in Jesus.") However the religions of the Indian sub-continent such as Buddhism, Hinduism and Jainism find mutual exclusivity wholly foreign. Scholars who come from these Western countries tend to see Buddhism as not a religion because it lacks the characteristic of mutual exclusivity.

Fourth, Buddhists and Buddhist Studies scholars have adopted the argument that Buddhist cultures are entirely different depending on their *Mahayana* or *Theravadan* orientation. Their reasoning is that if the different strands of the religion are so different as to make comparison impossible, legal comparisons are equally unfeasible. This is a trap however. How different from the widely varying interpretations of the Gospels are the Mahayana and Theravadan traditions both based on scriptures that were recorded right after the Buddha's fifty years of teaching? Are these two religious strands really more different than Christian orthodox Turks on the one hand and American Southern Evangelicals who speak in tongues and carry poisonous snakes on the other?

Fifth, *Areal studies* has had a strong divisive impact on the study of Buddhism by further entrenching national differences. Knowledge gathered by country means that there will be conferences on Chinese Buddhism or Japanese Buddhism but not both, that the differences between the two will be understood as great and that their relationship will be chronological (first China, then Japan). It is here that the reinforcing messages of disciplinarity are the most persuasive.

Sixth, the last fifteen years have been heavily influenced by *postmodern theory* which emphasizes differences and the extreme ends of the spectrum as it ignores the middle. Books focus on the local and odd or the global and overwhelming. This scholarly tendency does not favor the general larger questions, the religious questions, the moral and ethical questions. Under this rubric, Buddhist legal culture is a universalizing gesture that is wrong because it is essentialist, trying to create a non-existent, modern narrative of unity ("pan-Buddhist" legal system) when there is none.

Seventh, and perhaps most important, Buddhism is a very new religion in the West. Few of its texts have been

translated and knowledge of its many sects and practices is very obscure to many Americans. The number of texts that have been translated into any Western languages remains at 5 or 10%, and understandably, almost all of these have been religious and not legal.

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So, in conclusion, I would say that I have shifted away from the *disciplinarity* perspective, not because it is invalid but because it is too simple a framework. Buddhist Legal Studies is not a lost subject matter, it is rather a sort of hole, a hole that can arise even in this world of pluri/multi/intra/interdisciplinary studies. Several intersecting forces, not the least of which is too few people trained in it or even thinking about it, resulted in the gap. Rather than a subject matter that was being "othered" and repressed or impeded by stronger disciplines, it is now my impression that it is a subject matter that simply needs to be built, coordinated, and nurtured. Classic texts need to be established, conferences held, edited series of volumes initiated. Perhaps, a critical pedagogy needs to be developed, a literature created to then critique and examine, M.A. and Ph.D. academic training programs in both religious studies departments and law schools developed by chaired professors. After fifteen years of looking for a place to fit and complaining that no one would take me in, I have realized that I need to set up my own tent. Indeed, Weinstein's challenge has become an inspiration.

